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**Riverbay Corporation, d/b/a Co-Op City and Co-Op City Police Benevolent Association. Case 2-CA-32617**

February 24, 2004

**DECISION AND ORDER**

**BY CHAIRMAN BATTISTA AND MEMBERS SCHAUMBER  
AND WALSH**

On June 28, 2002, Administrative Law Judge Michael A. Marcionese issued the attached decision. The General Counsel filed exceptions and a supporting brief, the Respondent filed cross-exceptions and a brief in support of its cross-exceptions and in answer to the exceptions of the General Counsel. The General Counsel filed an answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, and conclusions and to adopt the recommended Order.

**The Issue**

The principal issue before the Board is whether the judge correctly found that the Respondent did not violate Section 8(a)(1) by maintaining a rule that prohibited employees from participating in the election of the members of the Respondent's board of directors. Contrary to our dissenting colleague, we agree with the judge's dismissal of this complaint allegation.

**Factual Summary**

The facts are fully set forth in the judge's decision. In brief, the Union in this case, the Co-op City Police Benevolent Association, represents the armed and unarmed security officers and lobby guards employed in the Respondent's department of public safety. There are approximately 95 to 110 employees in the unit.

The Respondent, a limited profit housing company organized under the laws of New York State, owns, maintains and operates a middle-income cooperative housing development in the Bronx, New York, known as Co-op City. Co-op City consists of 15,372 apartments in 35 high-rise buildings and 8 clusters of 3-story townhouse buildings, 3 shopping centers, and 8 parking garages on a 330-acre site. The Respondent is owned by shareholders or "cooperators," who own and reside in the apartment units.

The Respondent is governed by a 15-member board of directors who hire a general manager to run the complex on a day-to-day basis. At all times material to this case, the general manager was Marion Scott Real Estate, Inc. (Marion Scott), with Kenneth Silverman, a Marion Scott employee, serving as the Executive General Manager.

State regulations governing entities like the Respondent, the Respondent's bylaws, and its management contract with Marion Scott establish that the board of directors has no direct control over unit employees' terms and conditions of employment. Rather, Respondent's board of directors functions much like the directors of any corporation, i.e., they set corporate policy, look out for the interests of stockholders, and delegate day-to-day management of the business to professionals hired for that purpose. The regulations of the New York State Division of Housing and Community Renewal, chapter IV, section 1725-3.3 specifically codify that State's public policy against interference by a co-op's board "with the day-to-day management and operation of a project or with its employees." Thus, here, Marion Scott had full responsibility for hiring, discipline, and termination of employees. The board had also delegated to Marion Scott full responsibility for negotiating and administering collective-bargaining agreements with the various labor organizations representing Respondent's employees.<sup>1</sup> In addition, Marion Scott had final authority over the settlement of grievances with employees and their unions.

Of the 15 members on the Respondent's board of directors, 5 new members are elected each year by the shareholders/cooperators to serve 3-year terms. Elections are conducted by secret ballot and only resident shareholders may vote for and serve as directors. Elections are held in May and are usually preceded by a 1-2 month campaign.

The Respondent has maintained a rule restricting employee participation in board of director elections since early 1999. It reads as follows:

Employees living in Co-op City are encouraged to individually exercise their rights as residents of the community during the Board of Directors election. They shall refrain, however, from engaging in any activity, such as organizing other employees, that might be construed as an attempt to use their position for the purpose of influencing the outcome of the election. All employee groups and organizations are prohibited from participating either directly or indirectly in the electoral process. They may not raise funds, give donations, encourage their members to give donations, issue en-

<sup>1</sup> The board's role is limited to voting on ratification of the contract negotiated by Marion Scott.

dorsements, distribute campaign material, or engage in any other activity that may reasonably be expected to benefit a particular candidate or group of candidates. Non-resident employees may not participate in the electoral process in any manner except where otherwise specified as part of their normal job duties. Candidates who encourage, accept, or knowingly benefit from such participation are subject to disqualification by the Committee.

The Respondent revoked this rule in the spring of 2000 and replaced it with the following rule, which was still in effect at the time of the hearing:

The election of the Board of Directors is a right of residents in Co-op City. Employees living in Co-op City are encouraged to exercise their rights as residents of the community during the Board of Directors election within the scope of this policy. All Riverbay employees are reminded that as employees they have a duty of loyalty to Riverbay and should not engage in any activity which raises the appearance of impropriety. Participation in the electoral process must not interfere with employees' work duties. All employees shall refrain from engaging in any activity which might be construed as an attempt to abuse their positions as employees for the purpose of influencing the outcome of the election. Examples of acts that may be deemed an abuse of employee position include: soliciting donations for particular candidate(s), distributing campaign material for or against particular candidate(s), or engaging in any other activity which may reasonably be construed as an abuse of position.

Nonresident employees and employee groups and organizations are prohibited from participation in the electoral process.

Candidates who encourage, accept, or knowingly benefit from such prohibited participation are subject to disqualification by the Committee.

This policy does not affect employees' right to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection or their right to refrain from any or all such activities.

The judge implicitly found, and for the purposes of this decision we can agree, that there is no material distinction between these rules.<sup>2</sup> Both rules differentiate

<sup>2</sup> Arguably, the 1999 and 2000 rules differ in that the former explicitly distinguishes between individual and group participation in co-op board elections while the latter does not. Because the parties have not litigated this case on that basis, we assume, *arguendo*, that the second rule, like the first, is aimed at concerted activity.

between employees who are residents and those who are not. Employees who are residents have the right to participate individually in the election process. Employees who are not residents, on the other hand, have no such right. In sum, the rules, on their face, only prohibit employees from using their positions as employees to affect the outcome of the election of a member of the Respondent's board of directors.

Nevertheless, the General Counsel contends that the Respondent violated Section 8(a)(1) of the Act merely by maintaining these rules. In an attempt to show some nexus between the election of a member of the Respondent's board of directors and the Section 7 rights of employees, the General Counsel adduced evidence at the hearing concerning the following two matters.

#### 1. The lobby attendant program

Iris Baez was one of the candidates in the 1999 board of directors election. As part of her candidacy, Baez championed a proposal to create a new position of lobby attendant. The judge found that a lobby attendant position arguably would impact the employees represented by the Union because the money budgeted to pay the wages and benefits of the new employees could reduce funds available to compensate existing employees. In addition, duties assigned to the lobby attendants could reduce the role of the existing security force.

Baez won the election and was thereafter selected by the other directors to serve as the Respondent's president. In 2001, the lobby attendant program that Baez advocated was implemented.<sup>3</sup>

#### 2. The discharge of Joseph Pizzano

The judge found that Baez "played a significant role" in the Respondent's decision to terminate Joseph Pizzano, a public safety officer and resident shareholder. Pizzano was a member of the Union and in 1999 served as its president. Pizzano and the Union opposed Baez's candidacy for the board of directors because of her support for the lobby attendant position.

In his capacity only as a resident shareholder, Pizzano produced and distributed a two-page flyer entitled, "An Unsolicited Opinion from Alcott Place."<sup>4</sup> The flyer was critical of the candidacy of Baez and her position on several issues, including the lobby attendant program. Pizzano placed his name and address on the flyer, but made no mention of his employment or union status.

After her election, Baez initiated a complaint against Pizzano based on his preparation of the flyer. Pizzano was ultimately discharged in November 1999 under the

<sup>3</sup> In March 2001, the lobby attendants were added to the unit represented by the Union.

<sup>4</sup> Alcott place was the name of the building in which Pizzano lived.

first of the rules quoted above. Although the unfair labor practice charge originally alleged that Pizzano was terminated in violation of Section 8(a)(1) and (3), the Union withdrew that aspect of the charge, and the complaint contains no such allegation. Therefore, as the judge correctly recognized, the legality of Pizzano's discharge is not before us.

### Analysis and Conclusion

#### 1. The judge's decision

The judge found that the Respondent's rules, on their face, did not prohibit the employees from expressing their views on issues affecting their terms and conditions of employment. Instead, he found that the rule prohibited employees from engaging in activities designed to affect the outcome of the board of directors' election, which was a legitimate prohibition because employees do not have a Section 7 right to designate individuals who set corporate policy. The judge stated that there is a distinction between protesting an employer's policies or business decisions and seeking a role in making those decisions. The Respondent could lawfully prohibit the latter, and it was precisely the latter that Pizzano was trying to do.

Thus, the judge found that Pizzano was not engaged in protected concerted activity when he prepared and distributed his leaflet. Although the leaflet did address some of the concerns of the Union and the employees regarding the lobby attendant proposal, it also criticized the incumbent directors, Baez, and her slate of candidates for decisions that had little or no impact on employees. Further, the judge continued, Pizzano framed his leaflet as an "unsolicited opinion" of a resident who was concerned about the directors' stewardship of the cooperative's assets. The judge found such concerns outside the scope of Section 7. The judge further found that anyone reading the leaflet could not reasonably conclude that Pizzano was speaking out as an employee, noting that Pizzano was careful not to mention his status as an employee. The judge concluded, therefore, that the application of the rule to Pizzano did not establish that the rule could reasonably be interpreted by employees as limiting or prohibiting them from engaging in Section 7 activity. We agree.

Although the judge recognized that Baez retaliated against Pizzano for preparing and distributing his flyer, he found that the "single instance of a lone director exercising undue influence over the Respondent's managers" was insufficient to establish that the rule, on its face, would reasonably tend to chill employees in the exercise of Section 7 rights. The judge reiterated that Pizzano was not engaged in protected concerted activity when he

communicated by way of his leaflet with fellow shareholders regarding the election, an activity that the rule permitted. Therefore, the judge continued, the rule, on its face, permitted Pizzano's participation in the election as a resident and because Pizzano scrupulously avoided any mention of his employee or union status, he did not in fact violate the rule. In sum, the judge found that the General Counsel did not meet his burden of proving that the Respondent's rule prohibiting the participation of employees in the election of the Respondent's board of directors would reasonably tend to chill employees in the exercise of their Section 7 rights. We agree.

#### 2. Applicable principles

In general, "employee efforts to affect the ultimate direction and managerial policies of the business are beyond the scope" of Section 7. *Lutheran Social Service of Minnesota*, 250 NLRB 35, 41 (1980). Thus, "an employee . . . has no protected right to engage in activities designed solely for the purpose of influencing or producing changes in the management hierarchy." *Retail Clerks, Local 770*, 208 NLRB 356, 357 (1974). In a narrow category of cases, however, an employee protest over the selection of a supervisor or other management official may be held to be protected by the Act if, and only if, the "facts establish that the identity and capability of the supervisor involved has a direct impact on the employees' own job interests and on their performance of the work they are hired to do." *Dobbs Houses*, 135 NLRB 885, 888 (1962), enf. denied 325 F.2d 531 (5th Cir. 1962).<sup>5</sup>

#### 3. Application of principles

As stated above, the issue before us is whether the Respondent violated Section 8(a)(1) by maintaining a rule that prohibited employees from participating in the election of the members of the Respondent's board of directors. Contrary to our dissenting colleague, and in agreement with the judge, we conclude that the mere maintenance of this rule would not "reasonably tend to chill employees in the exercise of their Section 7 rights." *Lafayette Park*, supra.

As discussed above, employee action seeking to influence the identity of the managerial hierarchy is normally

<sup>5</sup> The judge stated that such an employee protest must also employ reasonable means in order to be protected by the Act. We do not agree. As we recently stated in *Accel, Inc.*, 339 NLRB No. 134, slip op. at 1 (2003), "[T]he Board has not imposed a 'reasonable means' requirement on employees' concerted activity." See, e.g., *Trompler, Inc.*, 335 NLRB 478, 480, fn. 26 (2001) (citing *NLRB v. Washington Aluminum Co.*, 370 U.S. 9, 16 (1962), for the proposition that "the reasonableness of workers' decisions to engage in concerted activity is irrelevant to the determination of whether a labor dispute exists or not"), enf'd. 338 F.3d 747 (7th Cir. 2003).

unprotected under the Act. Because employees generally do not have a Section 7 right to participate in the election of a company's board of directors, the Respondent's rules on their face do not reach or "chill" protected activity.

Furthermore, the evidence the General Counsel adduced at the hearing does not establish that the Respondent's directors had a "direct impact" on the employees' terms and conditions of employment. *Dobbs House, Inc.*, supra. First, with respect to Baez' role in the introduction of the lobby attendant position, the judge found only that the hiring of such a new category of employees arguably would have some ultimate impact on the unit employees. This is far short of the required showing. At most, the effect was indirect and speculative, i.e., if Baez were elected, the Board would adopt the lobby attendant program, and if lobby attendants were hired, there might (or might not) be less funds available for existing employees. Obviously, all kinds of management decisions made by a company's board of directors could eventually have some conceivable effect on rank-and-file employees. Under the case law, however, the impact must be "direct," not speculative, eventual, or trickle down. E.g., *NLRB v. Oakes Machine Corp.*, 897 F.2d 84, 89-90 (2d Cir. 1990) (conduct of high-level supervisor "directly related to employee working conditions" where, inter alia, he gave employees job assignments that prevented them from qualifying for pay increases). Here, the record simply does not establish a direct link or nexus between the implementation of the lobby attendant program and the unit employees' working conditions.<sup>6</sup> Indeed, there is no evidence of any change in unit employees' wages, benefits, or terms and conditions of employment as a result of the eventual implementation of the lobby attendant program. Further, even if the Baez proposal, if implemented, would have a direct impact on terms and conditions of employment, Pizzano did not have a Section 7 right to seek her defeat as a candidate for board of directors. Employees do not have a protected right to seek changes in the composition of the top-level hierarchy that will run the company, even if one person is perceived as less favorable to employee concerns than another. In this regard, there is a distinction between the top hierarchy and lower levels of supervision. As stated in *Lutheran Social Services of Minnesota*, 250 NLRB 35, 41 (1980):

[T]here appears to be a tacit assumption that employee efforts to affect the ultimate direction and managerial policies of the business are beyond the scope of [the

<sup>6</sup> The dissent's claim that such a link exists is just that, a naked claim, unsupported by record evidence.

mutual aid and protection] clause. This distinction seems to be implicit in the line of cases which holds that protests against the appointment or termination of "low-level" supervisors may be protected when directly related to employees' conditions of employment [citations omitted] while similar activity with regard to "top management" of the employer is not safeguarded. [Citations omitted.]

Thus, the activities of Pizzano, aimed at defeating candidate Baez for board of directors, were not protected, and the Rule as applied to him was not unlawful.<sup>7</sup>

Second, with respect to the termination of Pizzano, we agree with the judge that the evidence strongly suggests that Baez played a significant role. However, the judge also correctly recognized that "this single instance of a lone director exercising undue influence over the Respondent's managers is not enough to establish that the rule, *on its face* [emphasis added], would reasonably tend to chill employees in the exercise of Section 7 rights." (Emphasis in original.)

It is axiomatic that Board findings must be based on evidence in the record considered as a whole. Thus, the Board must fairly consider and weigh all the record evidence. Here, the overwhelming record evidence demonstrates that the Respondent's board of directors plays no role in the day-to-day operations of the organization. As discussed above, state regulations, the Respondent's by-laws, and its management contract with Marion Scott all establish that it is the actions of Marion Scott, not the Respondent, that directly affect unit employees' wages, hours, or terms and conditions of employment. It is Marion Scott that is responsible for hiring and firing, setting employment policies, and negotiating and admin-

<sup>7</sup> *NLRB v. Oakes Machine Corp.*, 897 F.2d 84 (2d Cir. 1990), cited by our dissenting colleague, is distinguishable. The question there was whether an employee's letter complaining of the company president's use of employees to work on his personal projects (e.g., repairing the president's own airplane) was protected, concerted activity. Recognizing the rule that "employees customarily have no interest in the identity of high level management," the court found a narrow exception based on "the exceptional facts of this case" in which the company president

did have a direct contact with employees, and his activities paralleled those of a low level supervisor at least to the extent that he made some job assignments—those in which he removed employees from projects which were potentially profitable and reassigned them to unprofitable personal projects. Where, as here, a high level supervisor directly affects working conditions by tying salary increases to company profitability and then preventing employees from working on profitable company projects, he is vulnerable to concerted employee action that seeks to improve working conditions.

None of these "exceptional facts" is present here. In addition, the employee action here was aimed at preventing a person from holding a managerial position, not at how a manager would exercise managerial authority in regard to working conditions.

istering numerous collective-bargaining agreements. Concededly, the Pizzano termination shows that a director can, under exceptional circumstances, influence the decision, by Marion Scott, to discharge a unit employee. But the evidence concerning this matter, limited as it is to a single discharge influenced by a “lone director,” is simply insufficient to outweigh all the other record evidence supporting the conclusion that the Respondent’s directors do not have a direct impact on the employees’ terms and conditions of employment.

Finally, the Respondent has not by other actions led employees reasonably to believe that the rules prohibit Section 7 activity. Thus, there is no evidence that the Respondent promulgated the rules in response to union or protected concerted activity. In addition, the Respondent has not enforced the rule against employees for engaging in Section 7 activity. In this connection, we specifically adopt the judge’s finding that Pizzano was not engaged in protected activity when he prepared and distributed his leaflet.

#### 4. Response to dissent

The dissent’s argument that the Respondent’s rule is overbroad and would tend to chill the exercise of Section 7 rights is largely premised on the dissent’s assertion that the Respondent’s directors have a direct impact on employee terms and conditions of employment. For the reasons set forth above, the dissent’s premise lacks evidentiary support.

The dissent also argues that the Respondent’s rule fails to clearly define the area of permissible conduct. Again, we must disagree. The 1999 and 2000 versions of the rule are limited in scope and impact to employee participation in the Respondent’s election process, a matter outside the scope of Section 7. For a limited time period, employees are directed not to engage in any activity expected to benefit a particular candidate or group of candidates. Employees would not reasonably construe the rule as prohibiting them from otherwise addressing matters affecting their wages, hours, or working conditions. Although not necessary to our holding, we note that the 2000 version expressly affirms “employees’ right to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection or their right to refrain from any or all such activities.” We find no ambiguity in either version, and we conclude that employees would not reasonably read the rule as prohibiting Section 7 activity.

Finally, the dissent argues that employees would reasonably interpret the rule as prohibiting Section 7 conduct because the Respondent applied the rule to Pizzano’s distribution of his leaflet. This argument is flawed as well because, as stated above, Pizzano was not

engaged in protected activity when he prepared and distributed the leaflet, inasmuch as the leaflet was unquestionably directed at effecting a change in the composition of the Respondent’s board of directors. Further, employees would not reasonably perceive the leaflet as Section 7 activity because it was clear from the face of the leaflet that Pizzano was speaking in his capacity as a shareholder/resident (or cooperator), not in his capacity as an employee. In this regard, the dissent misses the point in arguing that Pizzano would have identified himself as an employee but for the Respondent’s instructions that he not do so. Even if Pizzano had identified himself as an employee, his leaflet would still not be protected because it was specifically directed at preventing the election of a director. The failure of the leaflet to refer to Pizzano’s employee status is highly significant for an entirely different reason: As the judge recognized, an “objective reader would see the leaflet for what it was, the opinions of a cooperator on a matter of concern to cooperators.” Under these circumstances, that same “objective reader” would not reasonably conclude from the application of the rule to leafleting activity by a cooperator concerning a Board of Directors election that the rule applied as well to Section 7 activity by an employee.<sup>8</sup>

#### 5. Conclusion

For all the above reasons, we conclude that the Respondent’s rule prohibiting employee participation in board of director elections, as it existed in 1999 and as modified in 2000, does not unlawfully interfere with, restrain, or coerce employees in the exercise of any rights protected by Section 7 of the Act.

#### ORDER

The recommended Order of the administrative law judge is adopted, and the complaint is dismissed.

Dated, Washington, D.C. February 24, 2004

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Robert J. Battista, Chairman

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Peter C. Schaumber, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

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<sup>8</sup> The dissent also emphasizes the unfairness of the Respondent’s decision to terminate Pizzano for conduct that the judge found did not breach its rule. As the judge stated in fn. 8 of his decision, however, it is possible that the Respondent’s termination of Pizzano’s employment violated his rights as a shareholder/resident, or violated New York State law. In any event, such issues are beyond the scope of this proceeding.

MEMBER WALSH, dissenting.

The Respondent violated Section 8(a)(1) of the Act by maintaining an overbroad rule prohibiting employees from participating in any way in the election of the Respondent's board of directors. The rule is clearly directed at protected activity, and subsequent events make it crystal clear that employees would interpret it as such and would be chilled from engaging in such activity. Accordingly, I must dissent from the majority's dismissal of this complaint allegation.

#### Discussion

Despite my disagreement with the result my colleagues reach, I agree with several aspects of their opinion. First, I agree that there is no material distinction between the two versions of the Respondent's rule. Both the 1999 and the 2000 versions broadly prohibit nonresident employees from participating in the election process in any way, shape, or form. As discussed below, the breadth of the prohibition was reinforced in instructions employees received from their supervisors not to participate in the 1999 election and not to express any opinions regarding the candidates or the issues.

Second, as the majority opinion recognizes, the relevant legal principles are set forth in *Lafayette Park Hotel*, 326 NLRB 824, 825 (1998), *enfd.* 203 F.3d 52 (D.C. Cir. 1999):

In determining whether the mere maintenance of rules such as those at issue here violates Section 8(a)(1), the appropriate inquiry is whether the rules would reasonably tend to chill employees in the exercise of their Section 7 rights. Where the rules are likely to have a chilling effect on Section 7 rights, the Board may conclude that their maintenance is an unfair labor practice, even absent evidence of enforcement. [Footnote and citations omitted.]

Finally, I agree with my colleagues that, in applying the *Lafayette Park* test, the Board considers whether employees would reasonably interpret a particular rule as prohibiting Section 7 conduct. The Board also considers whether there was any evidence that the employer had engaged in conduct that would lead employees reasonably to believe that the rule, in fact, prohibited Section 7 activity, such as enforcing the rule against employees who engaged in protected activity. *Id.* at 825–828.

Here, as discussed below, the General Counsel adduced evidence showing that employees reasonably interpreted the Respondent's rule as prohibiting Section 7 activity. In addition, the General Counsel adduced evidence that the Respondent, in fact, enforced the rule

against an employee engaged in protected concerted activity. Therefore, under the *Lafayette Park* framework, a finding is warranted that the Respondent violated Section 8(a)(1) by maintaining the rule.

#### 1. The lobby attendant program

Joseph Pizzano, a resident shareholder since 1984, had been employed by Respondent as a public safety officer since 1982 until his termination in November 1999. Pizzano served as the Union's president in 1999.

Also in 1999, Iris Baez announced her candidacy for the board of directors and championed as the centerpiece of her campaign a proposal to create a lobby attendant position. Pizzano and his fellow unit employees feared that the implementation of the proposal would adversely affect the public safety department because the money to pay lobby attendants would have to come from the department's budget. The union leadership and unit employees were concerned that the diversion of limited funds to pay for the new employees would undermine the role of public safety officers and could lead to downsizing. The controversy over the lobby attendant program and Baez' views on the matter were well documented in Respondent's official publication, *The Co-op City Times*.

Pizzano and the other public safety department employees regularly received verbal instructions from their supervisors not to participate in the 1999 board of directors election and not to express any opinions regarding the candidates or issues. In addition, on March 18, 1999, then-General Manager Amit Sikdar sent a signed memo to all staff reminding employees of the prohibition on employees' use of their positions to influence the outcome of the election. The memo included a reprint of the 1999 rule. At a March 16, 1999 meeting of the Union's executive board, the Union decided that it could do nothing to express its concerns about the election and the lobby attendant program because of the Respondent's rule.

It is well established that an employee protest over the selection of a manager is protected if the identity or actions of the manager in question has a "direct impact" on the employees' terms and conditions of employment.<sup>1</sup> Here, the employees' and the Union's concern that the

<sup>1</sup> *Midland Hilton & Towers*, 324 NLRB 1141, 1141 (1997); *Caterpillar, Inc.*, 321 NLRB 1178, 1179 (1996).

The fact that the manager may occupy a high level position does not "insulate him from the concerted action taken." *NLRB v. Oakes Machine Corp.*, 897 F.2d 84, 90 (2d Cir. 1990). "Although employees customarily have no interest in the identity of high level management, that is because those supervisors generally have no direct effect on conditions of employment . . . . Where, as here, a high level supervisor directly affects working conditions . . . he is vulnerable to concerted employee action that seeks to improve working conditions." *Id.*

lobby attendant program that Baez advocated would have such an impact is supported by the judge's own findings:

Such a program involved the hiring of a new category of employees whose unit placement could affect existing employees. Money budgeted to pay the wages and benefits of the new employees could reduce funds available to compensate existing employees. Duties assigned to the lobby attendants could reduce the role of the existing unit employees and might even call into question the necessity of maintaining the same size security force as previously existed. *Under these circumstances, employees would generally have a right under Section 7 to express their views regarding this issue.* [Emphasis added.]

The Respondent's employees did not lose that Section 7 right to express their views on the lobby attendant program simply because the issue surfaced in the context of an election for the Respondent's board of directors. On the contrary, if a candidate chooses to make the centerpiece of her campaign a proposal vitally affecting the job interests of rank-and-file employees, then the Respondent cannot prohibit the affected employees from exercising their statutory right to oppose that proposal and the candidate supporting it.<sup>2</sup> In other words, as the General Counsel correctly recognizes in his brief, "the implementation of the lobby attendant program and Respondent's 1999 board of directors' election were inextricably linked together."

The judge concluded that "the Respondent's election rule, on its face, does not prohibit the employees from expressing their views [on the lobby attendant program] in an appropriate manner," but only prohibited "employees engaging in activities designed to effect the outcome of the election of the Respondent's directors." The majority adopts the judge's narrow construction of the rule.

There is a major flaw in this approach. The rule does not define or even signal to employees what "an appropriate manner" for expressing their views might be. Thus, the Respondent's rule here is overly broad because it "fail[s] to define the area of permissible conduct in a manner clear to employees and thus cause[s] employees to refrain from engaging in protected activity." *Lafayette Park*, supra, 326 NLRB at 828 (quoting *American Cast Iron Pipe Co. v. NLRB*, 600 F.2d 132, 137 (8th Cir. 1979)).

<sup>2</sup> Contrary to the majority's contention, there was nothing speculative or remote about the threat the lobby attendant program posed to the public safety officers represented by the Union. Employees need not wait until layoffs occur before engaging in concerted activities for their mutual aid and protection.

Because the record shows that the Respondent's rule is overbroad and reasonably caused employees to refrain from exercising their Section 7 right to oppose the lobby attendant program and Baez' candidacy, a finding of a violation is warranted under the *Lafayette Park* test.

## 2. The discharge of Joseph Pizzano

In order to comply with the Respondent's rule, and after discussing the matter with the Union, Pizzano decided to produce and distribute a flyer opposing Baez' candidacy solely in his capacity as a resident without reference to his employment or union affiliation. Before doing so, Pizzano met with Michael Munns, an attorney in the Respondent's General Counsel's office, to discuss his plans. Munns told Pizzano that there was nothing the Respondent could do to stop him from distributing the flyer as long as he complied with the rule and made no reference to his employee or union status.

After his meeting with Munns, Pizzano prepared a two-page flyer entitled, "An Unsolicited Opinion From Alcott Place."<sup>3</sup> The flyer was critical of Baez on several issues, including the lobby attendant program. Pizzano placed his name and address on the flyer, but made no mention of his employment or union status. Before distributing the flyer, Pizzano met again with Munns to clarify the proper manner of distribution. Following Munns' instructions, Pizzano distributed about 2000 flyers in late April 1999.

On or about May 1, 1999, Baez distributed her own flyer in response to Pizzano's. In her flyer, Baez identified Pizzano as being an employee of the public safety department and president of the Union. Baez chastised Pizzano for being "dishonest" by not disclosing his complete identity.

Despite Pizzano's opposition, Baez was elected to the board and then was selected by her fellow directors to be the Respondent's president. Approximately 6 months later, Pizzano was terminated under the Respondent's rule for his conduct in producing and distributing the flyer. As the majority frankly acknowledges, the judge found that "Baez played a significant role in the Respondent's decision to terminate Pizzano" and that the retaliatory nature of the discharge was "transparent." The lobby attendant program that Baez advocated was approved in 2000 and implemented in 2001.

Although, as the majority emphasizes, the legality of Pizzano's discharge is not before us, the evidence that the General Counsel introduced on this matter is highly significant. As the judge (and my colleagues) correctly recognize, under the *Lafayette Park* test, "the evidence regarding Pizzano's termination [is] relevant to [the]

<sup>3</sup> Alcott Place was the building where Pizzano lived.

determination whether employees could reasonably believe that the rule prohibited Section 7 activity.” The judge (and my colleagues) go astray, however, in concluding (1) that Pizzano was not, in fact, engaged in protected concerted activity when he prepared and distributed the leaflet, and (2) that, therefore, employees could not reasonably believe that the rule reaches such activity.

Pizzano’s preparation and distribution of the leaflet represented concerted activity because it was undertaken after consultation with other union members. Pizzano’s leaflet was protected as it addressed Baez’ support for the lobby attendant program and the negative impact such a program would have on unit employees.

The judge found, and my colleagues agree, that because Pizzano’s leaflet went beyond the lobby attendant program and addressed other concerns that had no impact on employees, he was not engaged in protected activity either when he prepared the leaflet or when he distributed it. I disagree. All of Pizzano’s comments were made within the course of a labor dispute, which is defined in Section 2(9) of the Act as “any controversy concerning terms, tenure or conditions of employment.” Thus, Pizzano’s remarks in his leaflet on topics other than the lobby attendant program were still protected under Section 7 of the Act because they were made within the context of a continuing labor dispute, i.e., the Union’s opposition to the lobby attendant program. See, e.g., *Emarco, Inc.*, 284 NLRB 832, 834 (1987) (employees’ remarks to general contractor that employer subcontractor never paid its bills, was “no damn good,” and could not finish the job held protected because they were related to the ongoing labor dispute).

The fact that Pizzano omitted his employee status in order to comply with the Respondent’s rule hardly serves as a basis for stripping Pizzano of the protections of the Act. On the contrary, Pizzano is to be commended for being, in the words of the judge, “scrupulous” in his efforts to comply with the Respondent’s rule. The Respondent is in no position to contend that Pizzano’s flyer lacked statutory protection on this ground when it was the Respondent itself that instructed Pizzano not to refer to his position as an employee or union officer.

In sum, the overbreadth of the Respondent’s rule is confirmed by its own actions of enforcing it against an employee engaged in protected activity. Surely, when Pizzano’s fellow workers witnessed the fate that befell him, they would tend to refrain from engaging in any protected activities of their own.

#### CONCLUSION

For all the above reasons, the Respondent has violated Section 8(a)(1) of the Act, as alleged, by maintaining an overbroad rule that reasonably tends to interfere with,

restrain, and coerce employees in the exercise of their Section 7 rights.

Dated, Washington, D.C. February 24, 2004

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Dennis Walsh,

Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

*Vonda L. Marshall, Esq.*, for the General Counsel.

*Richard D. Landau, Esq.* and *Michael B. Hekle, Esq.* (Jackson Lewis Schnitzler & Krupman), for the Respondent.

*Anthony Lumia, Esq.*, of (Davis & Hersh), for the Charging Party.

#### DECISION

##### STATEMENT OF THE CASE

MICHAEL A. MARCIONESE, Administrative Law Judge. I heard this case in New York, New York, on May 1, 2002. Co-op City Police Benevolent Association (the Union) filed the charge on November 29, 1999, and amended it on May 18, 2000. The complaint issued November 29, 2001, alleging that the Respondent, Riverbay Corporation d/b/a Co-op City, violated Section 8(a)(1) of the Act by maintaining a rule that restricted employees from participating in the election of members of the Respondent’s board of directors. On December 14, 2001, the Respondent filed an answer to the complaint in which it admitted maintaining the disputed rule but denied that the rule violated the Act.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel and the Respondent, I make the following

##### FINDINGS OF FACT

##### I. JURISDICTION

The Respondent is a limited profit housing company organized under the laws of New York State that owns, maintains, and operates the middle income cooperative housing development located in the Bronx, New York, known as Co-op City. The Respondent annually derives gross revenues in excess of \$500,000 and purchases and receives at its Bronx, New York facility materials and supplies valued in excess of \$5000 directly from points located outside the State of New York. The Respondent admits and I find that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

##### II. ALLEGED UNFAIR LABOR PRACTICES

Co-op City consists of 15,372 apartment units in 35 high-rise buildings and eight clusters of three-story townhouse buildings, three shopping centers, and eight parking garages on a 330-acre site. The Respondent is owned by shareholders, or “cooperators”, who own and reside in the apartment units. It is governed



by a 15-member board of directors who hire a general manager to manage the complex on a day-to-day basis. At all times material to this case, the general manager was Marion Scott Real Estate, Inc. (Marion Scott). Kenneth Silverman has been the Respondent's executive general manager since October 1, 1999, and serves essentially as the Respondent's chief operations officer. He is also an employee of Marion Scott.

The Respondent employs close to 1,000 employees, approximately 85 percent of whom are represented by one of eight unions. Each union is party to a collective-bargaining agreement with the Respondent setting forth the wages, hours, and terms and conditions of employment of the employees in the respective bargaining unit it represents. Marion Scott negotiates these agreements on behalf of the Respondent and is responsible for administering the contracts on a daily basis. The Union in this case represents the armed and unarmed security officers and the lobby attendants employed in the department of public safety.<sup>1</sup> There were approximately 95–110 employees in the unit in calendar years 1999–2000. The department of public safety is headed by the chief of security. The unit employees are further supervised by lieutenants and sergeants who are excluded from the unit.

As noted above, the Respondent is governed by a 15-member board of directors. The directors in turn elect officers, including a president. One-third of the board is elected each year by the shareholders/cooperators to serve 3-year terms. Elections are conducted by secret ballot. Only resident shareholders may vote for and serve as directors. The election is held in May and is preceded by a campaign usually lasting one to two months.

There is no dispute that the Respondent has maintained a rule regarding employee participation in board of director elections at least since early 1999. The rule that existed prior to the Spring of 2000 was as follows:

Employees living in Co-op City are encouraged to individually exercise their rights as residents of the community during the Board of Directors election. They shall refrain, however, from engaging in any activity, such as organizing other employees, that might be construed as an attempt to use their position for the purpose of influencing the outcome of the election. All employee groups and organizations are prohibited from participating either directly or indirectly in the electoral process. They may not raise funds, give donations, encourage their members to give donations, issue endorsements, distribute campaign material, or engage in any other activity that may reasonably be expected to benefit a particular candidate or group of candidates. Non-resident employees may not participate in the electoral process in any manner except where otherwise specified as part of their normal job duties. Candidates who encourage, accept, or knowingly benefit from such participation are subject to disqualification by the Committee.

It is also undisputed that the Respondent revoked this rule in the spring of 2000 and promulgated the following rule, which was still in effect at the time of the hearing:

<sup>1</sup> The lobby attendants were added to the unit in March 2001.

The election of the Board of Directors is a right of residents in Co-op City. Employees living in Co-op City are encouraged to exercise their rights as residents of the community during the Board of Directors election within the scope of this policy. All Riverbay employees are reminded that as employees they have a duty of loyalty to Riverbay and should not engage in any activity which raises the appearance of impropriety. Participation in the electoral process must not interfere with employees' work duties. All employees shall refrain from engaging in any activity which might be construed as an attempt to abuse their positions as employees for the purpose of influencing the outcome of the election. Examples of acts that may be deemed to be an abuse of employee position include: soliciting donations for particular candidate(s), distributing campaign material for or against particular candidate(s), or engaging in other activity which may be reasonably construed as an abuse of position.

Nonresident employees and employee groups and organizations are prohibited from participation in the electoral process.

Candidates who encourage, accept, or knowingly benefit from such prohibited participation are subject to disqualification by the Committee.

This policy does not effect employees' right to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection or their right to refrain from any or all such activities.

Joseph Pizzano, a resident shareholder and former employee of the Respondent, testified regarding his participation in the 1999 board of directors election process and the application of the above rule to him. Pizzano, a resident since 1984, was employed by the Respondent as a public safety officer from March 1982 until November 6, 1999. He was a member of the Union and served as its president in 1999. Iris Baez, who is now the president of the Respondent's board of directors, was one of the candidates in the 1999 election. Pizzano testified that he was concerned about her candidacy because Baez had championed the proposal to create the lobby attendant position.<sup>2</sup> According to Pizzano, he and other unit employees were concerned that implementation of this proposal would adversely affect the public safety department because the money to pay the lobby attendants would have to come out of the department's budget. The union leadership and unit employees feared that the diversion of limited funds to pay for a cadre of new employees would undermine the role of public safety officers and could lead to downsizing. The controversy over the lobby attendant program and Baez' views on the matter were well documented in the *Co-op City Times*, the Respondent's official publication.<sup>3</sup>

Pizzano testified that he and other public safety department employees regularly received verbal instructions from their

<sup>2</sup> Lobby attendants are assigned stationary posts in the lobbies of the Respondent's high-rise buildings to monitor security and access to the buildings. The public safety officers were assigned primarily to moving posts, patrolling the entire sight.

<sup>3</sup> Alberta Robinson, a public safety officer and former member of the Union's executive board corroborated Pizzano's testimony regarding the Union's concerns about the lobby attendant program.

supervisors not to participate in the election and not to express any opinions regarding the candidates or the issues in the 1999 election. In addition, a March 18, 1999 memo to all staff signed by then-General Manager Amit Sikdar reminded employees of the prohibition on employees' use of their position to influence the outcome of the election and reprinted the above-quoted version of the rule that existed at that time. Pizzano testified further that, at a March 16, 1999 meeting of the Union's executive board, the Union decided that it could not do anything to express its views on the election or the lobby attendant issue because of these rules. According to Pizzano, he decided that he would speak out as an individual cooperator by producing and distributing a flyer opposing Baez' candidacy.<sup>4</sup> Before doing so, Pizzano met with Michael Munns, an attorney in the Respondent's General Counsel's office, to discuss his plans. Pizzano testified that Munns told him there was nothing the Respondent could do to stop him as long as Pizzano complied with the rules by not making any reference to his position as an employee or union officer. Munns also gave Pizzano a copy of the Respondent's bylaws.

After his meeting with Munns, Pizzano prepared a 2-page flyer with the heading "An Unsolicited Opinion From Alcott Place"<sup>5</sup> that was sharply critical of Baez and her position on a number of issues including the lobby attendant program. Pizzano signed the flyer with his name and address. The flyer contains no mention of his position as an employee of the Respondent, member of the Union or role as its president. Pizzano met with Munns again in late April 1999 before distributing the flyer to clarify the appropriate manner of distribution. According to Pizzano, Munns told him that he could distribute the flyer from 8 a.m. to 10 p.m., that the flyers could be placed under cooperators' doors and that they should cause absolutely no litter. Munns also told Pizzano that he could not wear his Riverbay uniform or any clothing or outerwear identifying himself as a union member while distributing the flyer. Following these instructions, Pizzano distributed about 2000 flyers. On or about May 1, 1999, Baez distributed flyers of her own in response to Pizzano's flyers. In Baez' flyer, she identifies Pizzano as the president of the Union and a member of the Public Safety department and castigates him for being "dishonest" by not disclosing his identity. Despite Pizzano's and the Union's opposition, Baez was elected to the board of directors and was thereafter selected by the other directors to be the Respondent's president. On November 4, 1999, more than 6 months after the election, Pizzano was terminated under the above-quoted rule for his conduct in producing and distributing the flyer.<sup>6</sup> The lobby attendant program that Baez advocated was approved in 2000 and implemented in 2001. Baez was still the Respondent's president at the time of the hearing.

The General Counsel placed in evidence internal correspondence and correspondence between the Respondent and its

former outside counsel showing that, after the election, Baez was involved in initiating the Respondent's review of Pizzano's conduct for possible discipline. Although outside counsel recommended, in June 1999, against taking any disciplinary action, the Respondent sought additional advice from another law firm 3 months later. The second firm apparently also recommended a lesser form of discipline. However, internal correspondence dated October 19, 1999, suggests that Baez preferred a stronger form of discipline. As previously noted, the Respondent decided to terminate Pizzano, imposing the strongest form of discipline, in early November. Silverman, who signed Pizzano's termination letter about a month after commencing his employment as the Respondent's executive general manager, acknowledged on cross-examination that it was Baez who complained to him about Pizzano's flyer and that he initiated the "investigation" that led to Pizzano's termination as a result of Baez' complaint. Silverman denied, however, that he needed or sought approval from the board of directors before making his decision to terminate Pizzano.

The Respondent offered the testimony of Silverman, as well as the Respondent's by-laws, its management contract with Marion Scott, and copies of state regulations governing entities like the Respondent to show that the Respondent's board of directors has no direct impact on unit employees' terms and conditions of employment. These documents establish that the Respondent's directors function much like the directors of any other corporation, i.e. they set corporate policy, look out for the interests of the shareholders, and delegate day-to-day management of the business to professionals hired for that purpose. The regulations of the New York State Division of Housing and Community Renewal, chapter IV, section 1725-3.3 specifically codifies the State's public policy against interference by members of a co-op's board "with the day-to-day management and operation of project or with its employees." The uncontradicted testimony of Silverman, which is corroborated to a great extent by the documents, demonstrates that Marion Scott has full responsibility for the hiring, discipline and termination of employees. According to Silverman, he makes the final decision regarding the termination of employees. The Respondent's board has also delegated to Marion Scott the authority to negotiate with the various labor organizations representing the Respondent's employees and to hear and adjust grievances filed by those employees. Although Marion Scott is required to submit any collective-bargaining agreement to the board for ratification, the board is not involved in the formulation of contract proposals or the negotiation of those proposals. With respect to grievances, the record shows that Silverman has final authority to enter into agreements with employees and their unions to settle complaints. According to Silverman, he is not required to submit these settlements to the board for prior approval.

The sole issue in this case is whether the above-quoted rule, as it existed in 1999 and/or as modified in 2000, unlawfully interferes with, restrains, or coerces employees in the exercise of any rights protected by Section 7 of the Act. The General Counsel argues that employees have a statutory right to participate in elections for members of the Respondent's board of directors because decisions made by these directors, such as the decision regarding the lobby attendant program, have an impact

<sup>4</sup> Robinson also corroborated Pizzano regarding these internal union discussions.

<sup>5</sup> Alcott Place was the building where Pizzano lived.

<sup>6</sup> Although the charge originally alleged Pizzano's termination as a violation of Sec. 8(a)(1) and (3) of the Act, the Union withdrew that aspect of the charge prior to issuance of the complaint.

on unit employees. Although counsel for the General Counsel offered evidence regarding enforcement of the rule against Pizzano, her theory of the case is that the rule is unlawful on its face and that mere maintenance of the rule violates Section 8(a)(1). The Respondent argues that Section 7 does not give employees the right to participate in the selection of individuals, like the Respondent's directors here, who are at the peak of an employer's management hierarchy. The Respondent contends that the rule, on its face, does not reach protected activity.

Many years ago, the Supreme Court recognized the tension that exists between the right of employees to self-organization and the right of employers to maintain order in the workplace and the Board's statutory role in accommodating these competing interests. *Republic Aviation v. NLRB*, 324 U.S. 793 (1945). In determining whether employer rules of conduct adequately accommodate or unlawfully infringe upon employees' statutory rights, the Board examines

whether the rules would reasonably tend to chill employees in the exercise of [those] rights. Where the rules are likely to have a chilling effect on Section 7 rights, the Board may conclude that their maintenance is an unfair labor practice, even absent evidence of enforcement.

*Lafayette Park Hotel*, 326 NLRB 824, 825 (1998), enf'd. 203 F.3d 52 (D.C. Cir. 1999) and cases cited therein; footnote omitted. In applying this test to the specific rules at issue in *Lafayette Park*, the Board considered whether employees would reasonably read or interpret a particular rule as prohibiting Section 7 conduct. The Board also considered whether there was any evidence that the employer had engaged in conduct that would lead employees reasonably to believe that the rule in fact prohibited Section 7 activity, such as enforcing the rule against employees who engaged in protected activity, or promulgating the rule in response to protected activity. *Id.* at 825–828.<sup>7</sup>

The Respondent's rule, on its face, addresses employee conduct in connection with the election of directors to the Respondent's governing board. The rule differentiates between employees who are residents/shareholders and those who are not. Employees who are not residents and the Union itself, are subject to a total prohibition on participation in these elections. The right of resident employees, as residents, to participate individually in the election process is recognized. However, they are prohibited from engaging in any activity, including concerted activity with other employees, that might be "construed as an attempt to use their position [as an employee] for the purpose of influencing the outcome of the election." The new rule adopted in 2000, while still limiting the right of resident employees, contains additional language clarifying the types of activities that would violate the rule. The new rule also contains

express language recognizing the right of employees to engage in "other concerted activity for the purpose of collective bargaining or other mutual aid or protection or . . . to refrain from any or all such activities." In order to determine whether this rule would "reasonably tend to chill employees in the exercise of their Section 7 rights," it must first be determined what right, if any, employees have under the Act to participate in the selection of the employer's board of directors.

The "mutual aid or protection" clause of Section 7 of the Act has been broadly construed to encompass concerted activity that is directed at the selection and retention of certain supervisory and managerial personnel where the activity concerns actual conditions of employment and the means employed by the employees is reasonable. *Yesterday's Children v. NLRB*, 115 F.3d 36 (1st Cir. 1997). The identity of an individual in the employer's managerial hierarchy who has a direct impact on the employees' wages, hours and working conditions, such as a supervisor with immediate authority over the employees, has been found to be a legitimate topic of concerted activity under Section 7. See, e.g., *Atlantic-Pacific Construction Co. v. NLRB*, 52 F.3d 260 (9th Cir. 1995); *NLRB v. Oakes Machine Corp.*, 897 F.2d 84 (2d Cir. 1990); *Senior Citizens Coordinating Council of Riverbay Community*, 330 NLRB 1100, 1103 (2000); *Dobbs Houses*, 135 NLRB 885 (1962), enf. denied 325 F.2d 531 (5th Cir. 1963). The Board and the courts have historically distinguished this type of protected activity from employee activity directed at affecting the ultimate direction and managerial policies of the business, which lies outside the scope of Section 7. *Lutheran Social Services of Minnesota*, 250 NLRB 35, 41 (1980); *Retail Clerks, Local 770*, 208 NLRB 356 (1974). Which side of the line any particular employee activity falls is a question of fact, based on the totality of circumstances. *NLRB v. Oakes Machine Corp.*, 897 F.2d supra at 89.

Under the Respondent's by-laws and the applicable laws and regulations of the State of New York, the Respondent's board of directors has no direct impact on unit employees' wages, hours, or terms and conditions of employment. At most, the directors indirectly affect employees' working conditions through their hiring and oversight of the general manager, Marion Scott. It is the actions of the general manager that directly impact the employees' working conditions, e.g., through the decisions it makes regarding hiring, discipline, and termination of employees; by negotiating with the Union regarding the employees wages, benefits, and other working conditions and by adjusting their grievances; and, through the department heads and other supervisors it hires, assigning and directing employees' work on a day-to-day basis. The only evidence in the record which might show the type of direct impact necessary to give the employees a statutory right to a voice in the selection of the Respondent's board of directors is the board's consideration of the lobby attendant program and the involvement of one director in Pizzano's termination. These are the two facts the General Counsel relies upon to prove her theory of the case.

The decision to adopt a lobby attendant program arguably would impact the unit employees. Such a program involved the hiring of a new category of employees whose unit placement could affect existing employees. Money budgeted to pay the

<sup>7</sup> Although there is evidence of enforcement in the instant case, i.e. Pizzano's termination, it is unnecessary for me to decide whether the Respondent's application of the rule to Pizzano's conduct during the 1999 election campaign was unlawful because the complaint does not allege such a violation. The complaint alleges that the mere maintenance of the rule was unlawful. I have, however, considered the evidence regarding Pizzano's termination as relevant to my determination whether employees could reasonably believe that the rule prohibited Section 7 activity. See *Lafayette Park Hotel*, supra.

wages and benefits of the new employees could reduce funds available to compensate existing employees. Duties assigned to the lobby attendants could reduce the role of the existing unit employees and might even call into question the necessity of maintaining the same size security force as previously existed. Under these circumstances, employees would generally have a right under Section 7 to express their views regarding this issue. However, the Respondent's election rule, on its face, does not prohibit the employees from expressing their views in an appropriate manner. What the rule prohibits is employees engaging in activities designed to effect the outcome of the election of the Respondent's directors. That is a different matter entirely. Under the well-established interpretation of Section 7 noted above, employees do not have a right to designate those individuals who set corporate policy and make the core entrepreneurial decisions necessary to run the business. *Retail Clerks*, supra. There is a distinction, which the Board and the courts have recognized, between protesting an employer's policies or business decisions and seeking a roll in making those decisions. See, e.g., *Harrah's Lake Tahoe Resort Casino*, 307 NLRB 182 (1992) (activity advocating an employee stock ownership plan that would give employees 50 percent ownership of the employer is not protected by Section 7 of the Act because it does not advance employees' interests as employees but rather advances employees' interests as entrepreneurs, owners, and managers).

One might argue, as the General Counsel does, that the Respondent's application of the rule to Pizzano's distribution of his preelection leaflet shows that the employer intended the rule to cover protected activity, or that this application of the rule would reasonably lead employees to believe that the rule prohibited Section 7 activity. However, I find that Pizzano was not engaging in protected concerted activity when he prepared and distributed his leaflet. Although the leaflet addressed some of the concerns of the Union and the employees regarding the lobby attendant proposal, it also criticized the incumbent directors, and Baez and her slate of candidates, for decisions that had little or no impact on employees. In addition, Pizzano framed his leaflet as the "unsolicited opinion" of a resident who was concerned about the directors' stewardship of the cooperative's assets. Such concerns are outside the scope of Section 7. See *Harrah's Lake Tahoe Resort Casino*. Anyone reading Pizzano's leaflet could not reasonably conclude that he was speaking out as an employee. In fact, he was careful not to mention his status as an employee. An objective reader would see the leaflet for what it was, the opinions of a cooperator on a matter of concern to cooperators. Thus, the application of the rule to Pizzano, under the circumstances, does not establish that the rule could reasonably be interpreted by employees as limiting or prohibiting them from engaging in Section 7 activity.<sup>8</sup>

The evidence in the record strongly suggests that Baez played a significant role in the Respondent's decision to terminate Pizzano. Despite the advice of two outside attorneys

against taking this action, Silverman admittedly terminated Pizzano after receiving a complaint from Baez. The Respondent's own internal correspondence indicates that Baez preferred that such action be taken against Pizzano. The retaliatory nature of Baez' efforts to punish Pizzano for the leaflet are transparent. Nevertheless, this single instance of a lone director exercising undue influence over the Respondent's managers is not enough to establish that the rule, *on its face* [emphasis added], would reasonably tend to chill employees in the exercise of Section 7 rights. As noted above, Pizzano was not engaged in protected concerted activity when he communicated with his fellow cooperators regarding the upcoming election. Moreover, the rule, on its face, permitted Pizzano's participation in the election as a resident. Because he was scrupulous in avoiding any conduct that could be deemed use of his position as a union officer and employee to influence the outcome of the election, he did not in fact violate the rule. Under these circumstances, employees would not reasonably conclude that activity protected by Section 7 of the Act was prohibited by the rule.

In sum, I find that the General Counsel has not met his burden of proving that the Respondent's rule regarding the participation of employees in the election of the Respondent's board of directors would reasonably tend to chill employees in the exercise of their Section 7 rights. *Lafayette Park Hotel*, supra. The rule, on its face, only prohibits employees from using their position as employees to affect the outcome of the election. Because employees do not have a right under Section 7 of the Act to select an employer's directors, the rule does not reach protected activity. No reasonable construction of the rule, either in its 1999 form, or as modified in 2000, would limit employees in their right to concertedly express their opinions as employees, in an appropriate manner, on matters directly related to their working conditions. Accordingly, I shall recommend that the complaint be dismissed in its entirety.

#### CONCLUSIONS OF LAW

1. The Respondent did not interfere with, restrain or coerce its employees, in violation of Section 8(a)(1) of the Act, by maintaining a rule that prohibited employees from participating in the election of members of the Respondent's board of directors.

2. The Respondent did not interfere with, restrain or coerce its employees, in violation of Section 8(a)(1) of the Act, by modifying the rule described above in spring 2000.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended<sup>9</sup>

#### ORDER

The complaint is dismissed.

Dated, Washington, D.C. June 28, 2002

<sup>8</sup> It is possible that the Respondent's termination of Pizzano's employment violated his rights as a shareholder/cooperator, or violated New York state law governing housing cooperatives like the Respondent. Such issues are beyond the scope of this proceeding.

<sup>9</sup> If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.